NO. 48580-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

RODERICK KING-PICKETT, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-01708-0

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

RACHAEL R. PROBSTFELD, WSBA #37878
Senior Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

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STATEMENT OF THE CASE

Roderick Luther King-Pickett (hereafter 'King-Pickett') was charged by information with Robbery in the First Degree while armed with a deadly weapon and Burglary in the First Degree while armed with a deadly weapon. CP 3-4. The charges were based on allegations that King-Pickett was inside the residence of Michael Freeman-Lema and Mackenzee Opp without their permission and took personal property belonging to them, while armed with a hammer and a knife. CP 2.

At trial, Mr. Freeman-Lema testified that on September 4, 2015 he and his girlfriend, Ms. Opp, lived at the Bridge Creek Apartments located in Clark County, Washington. RP 62. On the evening of September 4, 2015, he and Ms. Opp left their apartment to go out for dinner. CP 63. Upon returning, they noticed the apartment was in disarray and was not in

the same state that they had left it. RP 64-66. Mr. Freeman-Lema noticed a light was on, but he hadn't left the lights on, and the sliding glass door to the balcony was propped open when it had not previously been open. RP 66. Mr. Freeman-Lema walked over to the sliding glass door and turned on the lights and saw a man with a knife and a hammer sitting at the table. RP 66. The person was wearing a dark gray or black hoodie sweatshirt. RP 67. He had a silver knife, possibly a butcher knife, with a 4 to 5 inch blade, and a hammer. RP 67. Mr. Freeman-Lema later discovered his cooking knife and hammer were missing. RP 67.

When Mr. Freeman-Lema saw the man on his deck, he closed the sliding glass door and locked it, and went and grabbed his gun from his closet. RP 68-69. Mr. Freeman-Lema told the person to leave his house. RP 69. Mr. Freeman-Lema cocked his gun, said "leave my house" again and stood by the front near a window telling him to leave. RP 69. Instead, the intruder lifted the glass on the door up and made his way inside the residence. RP 69. Mr. Freeman-Lema told the man to stop, "don't do that," "just leave." RP 69-70. As the intruder came towards Mr. Freeman-Lema, he backed up while aiming his gun at the intruder. RP 70. The intruder reached out, lunging at him a few times, still armed with the weapons, so Mr. Freeman-Lema shot at him. RP 70, 73. Mr. Freeman-Lema was scared for his life and wanted to disarm the intruder, so aimed

for his arm and shoulder area. RP 70, 73. The intruder yelled out, "ough, you shot me," so Mr. Freeman-Lema thought he had shot the intruder. RP 70. The entire time, the intruder was aggressive. RP 70. After he shot at the intruder, Mr. Freeman-Lema continued to back up, telling him to leave. RP 71. The intruder picked up a white bag and left. RP 72. Mr. Freeman-Lema noticed the intruder went out of the apartment complex towards the street. RP 74. Neighbors had gathered outside, worried about what was happening. RP 74. Mr. Freeman-Lema believed some of them had called the police so he put his gun in the trunk of his car so that he would not be armed when police arrived. RP 74.

Ms. Opp met Mr. Freeman-Lema in the parking lot by his car, and they were standing there in the parking lot when police arrived. RP 75-76. Mr. Freeman-Lema and Ms. Opp spoke to police and later did a field show up identification of a suspect. RP 77-80. Mr. Freeman-Lema testified that during the field identification he didn't know if the person was the intruder, and that he was "70% unsure" if the bag the suspect had was the same bag he saw the intruder with. RP 80-81. Mr. Freeman-Lema also indicated that a few days later he called police because he had heard some people saying that the police report said he knew who the intruder was, and he wanted to ensure the police officer knew that he was "70% unsure" who the intruder was. RP 87-89.

That night, after they were done speaking with the police, Mr. Freeman-Lema and Ms. Opp went to his cousin's house to spend the night. RP 77-78. Both Mr. Freeman-Lema and Ms. Opp were scared after what happened and felt traumatized. RP 78-80.

Later on, Mr. Freeman-Lema noticed his hammer that he kept in a drawer in the kitchen, and a knife from the kitchen, were missing. RP 79. Mr. Freeman-Lema also saw a bullet hole in the wall of his residence. RP 78.

Mr. Freeman-Lema could not recall any other details during his testimony of the intruder's physical description, and could not identify King-Pickett in the courtroom as the intruder. RP 77. Mr. Freeman-Lema testified that he did not want to be in court the day of his testimony and that it was "ridiculous." RP 81.

Ms. Opp testified that on September 4, 2015 she and her boyfriend, Mr. Freeman-Lema, went out to dinner at the Main Event in downtown Vancouver. RP 108-10. After dinner, they went for a short drive, and headed back to their apartment. RP 109-10. As they entered their apartment, Mr. Freeman-Lema in front of her, Ms. Opp heard Mr. Freeman-Lema tell her to wait and said something about someone being in the house or something looking weird. RP 110. Mr. Freeman-Lema said the back blinds leading out to their deck were moving in the wind, so the

door must be open. RP 111. Mr. Freeman-Lema then told Ms. Opp someone was in the house, so Ms. Opp backed up onto the stairs on the outside of their apartment (those leading up to the front door). RP 111. She waited there for a minute, and then heard Mr. Freeman-Lema yelling and fumbling around inside, and he told her to get off the stairs and go to the car, that there was someone inside. RP 113. Ms. Opp then went to the parking lot by her car. RP 113. Soon, Mr. Freeman-Lema came out and told her what was happening. RP 114-15. As he was talking, Ms. Opp saw someone walking around inside her home by where the front door was, so she started screaming and yelling. RP 115. Mr. Freeman-Lema ran back into the apartment and Ms. Opp stayed outside. RP 115-16. Ms. Opp saw some neighbors calling 911, concerned that Mr. Freeman-Lema had a gun, so Ms. Opp also called 911 to explain the situation. RP 116. Ms. Opp then saw Mr. Freeman-Lema backing up out of the front door, with a man in a hoodie standing at the front door holding a hammer and a bag of stuff. RP 116. Ms. Opp heard Mr. Freeman-Lema repeatedly tell the person to get out of the house. RP 116. The intruder refused to leave and said he was not leaving. RP 117. He then aggressively went towards Mr. Freeman-Lema, and Ms. Opp screamed; she was still on the phone with 911. RP 117. Ms. Opp thought the intruder was going to hurt Mr. Freeman-Lema; she saw Mr. Freeman-Lema then fire one shot with his gun, towards the

man's shoulder area. RP 117-18. The intruder then ran down the stairs and out of the apartment complex into the street towards Burton road. RP 118. Ms. Opp observed this intruder to be an African-American male wearing a gray hoodie pulled up over his head, jeans, and white sneakers, and standing approximately 5'11" tall. RP 119. Ms. Opp was unable to identify King-Pickett at trial. RP 133.

Ms. Opp also went to the scene where King-Pickett was apprehended and was asked by police to identify any items that may belong to her. RP 120. She identified several photographs of the recovered property as the belongings she identified for police that night: exhibit 3 is a necklace that belonged to Mr. Freeman-Lema, exhibit 4 are her glasses and phone charger, exhibit 7 is an iPad and charger that belonged to her, and exhibit 8 is clothes she had bought for her nephews. RP 121-33. All the items were inside their apartment prior to the burglary. *Id.*

The 911 call that Ms. Opp made was admitted into evidence. RP 135. During that call, Ms. Opp gave the following description of the intruder: "He's Black, a really dark skinned male. He has a gray sweatshirt on with a hoodie over it, jeans, white tennis shoes, and he has a white garbage bag in his hand." RP 137. She later clarified that his jeans were "light blue." RP 142. She indicated he appeared to be 5'7" or 5'8" tall, and in his 20s. RP 137.

After the incident, Ms. Opp returned to her apartment and noticed food out of their fridge had been eaten, there were dishes in the sink, stuff was missing from their living room, the blinds were broken off near the back balcony, and she saw a bullet hole in the mirror in their hallway. RP 147. Ms. Opp then packed a bag and stayed somewhere else for several days because she did not feel safe or comfortable at the apartment anymore. RP 148. She and Mr. Freeman-Lema ended up moving out of the apartment due to this incident. RP 148.

Officer Ben Taylor of the Vancouver Police Department was the main investigating officer involved in this case. RP 194. He arrived at 10:24 p.m., four minutes after Ms. Opp called 911, on September 4, 2015 to the apartment building where Ms. Opp and Mr. Freeman-Lema lived. RP 195-96, 204. He made contact with Ms. Opp, who was crying and shaking, and Mr. Freeman-Lema, who seemed scared and excited, in the parking lot in front of their apartment. RP 198. Officer Taylor initially got a description of the intruder from Mr. Freeman-Lema and Ms. Opp, and then took their statements about what happened. RP 200. He then stayed on scene at the apartment while other officers were involved in locating the intruder and having the victims identify him and their belongings. RP 209. He searched and photographed the apartment, noting the point of entry at the back sliding glass door, and finding the bullet lodged in the

wall in the hallway behind a mirror. RP 209-25. Officer Taylor took photographs of the apartment and many of those were admitted at trial. RP 210-20.

Corporal Ryan Junker of the Vancouver Police Department also dispatched to this incident. RP 168-70. On his way towards the apartment, he drove the area of where he thought someone might travel on foot if coming from the apartment. RP 169-70. At 10:33 p.m. Cpl. Junker came upon King-Pickett who was walking in the middle of the road, heading towards the side of the road. RP 170, 204. Cpl. Junker stopped King-Pickett because he matched the general description of the intruder, was carrying a bag matching the description of the bag the intruder carried, and was coming from the direction of the apartment. RP 171. King-Pickett was also sweating heavily despite it being a cool evening. RP 172. King-Pickett wore jeans and a shirt, and was carrying a dark hoodie sweatshirt and white shopping bag in his hand. RP 172-73. The sweatshirt King-Pickett was holding when Cpl. Junker apprehended him was admitted into evidence as exhibit 54. RP 175. Cpl. Junker also took photographs of the items found inside the white bag, most of which belonged to Ms. Opp and Mr. Freeman-Lema. RP 175-79, 191.

Officer Richard Lagerquist with the Vancouver Police Department assisted in the investigation of this incident on September 4, 2015. RP

160-62. He transported Mr. Freeman-Lema and Ms. Opp to the location of King-Pickett to do an in-field show up to see if either of them recognized the defendant. RP 162. Mr. Freeman-Lema was advised that simply because someone was stopped by police does not mean they are necessarily the person involved. RP 162-63. When Officer Lagerquist drove up with Mr. Freeman-Lema, another officer had King-Pickett face the vehicle. RP 163. Upon seeing him, Mr. Freeman-Lema stated, "yeah, that's him." RP 163. He later told the officer he was "70 percent sure" that the person was the one involved in the incident. RP 163. Officer Lagerquist also transported Ms. Opp and asked her if she was able to identify the items and bag found with King-Pickett. RP 164. She was able to identify several items in the bag that belonged to her and some that belonged to Mr. Freeman-Lema. RP 175. For the iPad, Ms. Opp gave police a 4 digit code which unlocked the iPad when police entered it. RP 176.

Officer Roger Evans of the Vancouver Police Department is a canine handler for the department. RP 248. He works with his canine partner, Trip. RP 250. On September 4, 2015 Officer Evans used Trip to attempt to locate the suspect in the burglary of Ms. Opp and Mr. Freeman-Lema's apartment. RP 255. He commanded Trip to track, and eventually Trip picked up an odor and began to track that odor. RP 255-60. This track

led Officer Evans to where Cpl Junker had King-Pickett detained. RP 260. Officer Evans followed Trip's track until Trip alerted to some bags that were present, indicating the scent of the bags was the scent he had been tracking. RP 260-61. King-Pickett was located about .8 miles from the apartment complex. RP 261.

A few days after the burglary, Mr. Freeman-Lema called Officer Taylor. RP 226. During an offer of proof outside the presence of the jury, Officer Taylor indicated that Mr. Freeman-Lema told him that he had been confronted by an acquaintance and told that he told police he was able to identify the suspect with 70 percent positivity, but Mr. Freeman-Lema indicated that was not correct and maybe he misspoke. RP 226-27. Mr. Freeman-Lema told Officer Taylor that he was only 30 percent sure that the person he saw was the same person who was inside his apartment. RP 227. Mr. Freeman-Lema indicated that some acquaintances who were "affiliated with some organizations" didn't "find it kindly that he was testifying against somebody that they knew." RP 227. The State moved to admit this evidence and allow Officer Taylor to testify to this before the jury, but the Court denied this motion and excluded Officer Taylor's testimony on this subject. RP 227-29.

After the State rested its case, defense rested without presenting any witnesses. The trial court then instructed the jury, including giving the

standard jury instruction for reasonable doubt, WPIC 4.01. RP 297-98, CP 99. King-Pickett had no objections to any of the jury instructions the court gave. RP 293. King-Pickett proposed jury instructions for the court, including a duplicate of the reasonable doubt instruction the court gave, WPIC 4.01. CP 55.

During closing argument, the prosecutor made the following statements:

> And here on the stand you heard from Mr. Freeman-Lema that he doesn't want to be here. He doesn't want to be a part of this. It seems like he's moved on with his life. For whatever reason, he didn't want to testify. Well, that doesn't mean the defendant's not guilty.
>
> And he said on the stand I'm spretty sure I said to the police I'm 70 percent unsure that that's the person. He also said three or four days later he called law enforcement to attempt to correct the police report.
>
> There could have been outside influences. There could have been something that happened to Mr. Freeman-Lema that caused him to lessen his identification or change his story somewhat. Either way that 911 tape the day in question right after this happened when it was fresh in their mind, they gave a pretty clear description that matched this person we have in court.
>
> But that's not all we have. We also have what's called circumstantial evidence....

RP 320. King-Pickett did not object to this argument. RP 320.

The jury returned guilty verdicts on Burglary in the First Degree and Robbery in the First Degree, finding for both that King-Pickett was

armed with a deadly weapon. CP 122-25. King-Pickett was then sentenced to a standard range sentence of 112 months with a 48 month deadly weapon enhancement. CP 131. This appeal followed.

ARGUMENT

I. The prosecutor did not commit misconduct

King-Pickett alleges the prosecutor committed misconduct during closing argument by arguing that the eye-witness to the crime may have changed his story at trial due to some outside influence or event. King-Pickett failed to preserve his claim of prosecutorial misconduct and has not shown that this instance of alleged misconduct was so flagrant and ill-intentioned that it denied him a fair trial. King-Pickett's claim fails.

A defendant has a significant burden when arguing that prosecutorial misconduct requires reversal of his convictions. *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's complained of conduct was "both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997))). To prove

prejudice, the defendant must show that there was a substantial likelihood that the misconduct affected the verdict. *Magers*, 164 Wn.2d 191 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). A defendant must object at the time of the alleged improper remarks or conduct. A defendant who fails to object waives the error unless the remark is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). When reviewing a claim of prosecutorial misconduct, the court should review the statements in the context of the entire case. *Id.*

In the context of closing arguments, a prosecuting attorney has "wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory,* 158 Wn.2d, 759, 860, 147 P.3d 1201 (2006)). The purported improper comments should be reviewed in the context of the entire argument. *Id.* The court should review a prosecutor's comments during closing in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

In arguing the law, a prosecutor is confined to correctly characterizing the law stated in the court's instructions. *State v. Burton*, 165 Wn. App. 866, 885, 269 P.3d 337 (2012) (citing *State v. Estill*, 80 Wn.2d 196, 199-200, 492 P.2d 1037 (1972)). It can be misconduct for a prosecutor to misstate the court's instruction on the law, to tell a jury to acquit you must find the State's witnesses are lying, or that they must have a reason not to convict, or to equate proof beyond a reasonable doubt to everyday decision-making. *Id* (citing to *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984), *State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996), *State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009), and *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008)). Contextual consideration of the prosecutor's statements is important. *Burton*, 165 Wn. App. at 885.

Improper argument does not require reversal unless the error was prejudicial to the defendant. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The court in *Davenport* stated:

> Only those errors [that] may have affected the outcome of the trial are prejudicial. Errors that deny a defendant a fair trial are per se prejudicial. To determine whether the trial was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury. In doing so, the court should consider whether the irregularity could be cured by instructing the jury to disregard the remark. Therefore, in examining the entire record, the question to be resolved is whether there is a substantial

> likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial.

Davenport, 100 Wn.2d at 762-63.

In King-Pickett's case, any potential misstatement by the prosecutor did not affect the jury verdict and he was not denied a fair trial. King-Pickett argues the prosecutor argued facts not in evidence and intentionally put excluded evidence before the jury by discussing facts not in evidence during his closing argument. However, the argument by the prosecutor was a fair and reasonable inference from the evidence presented at trial. The State showed the witness, Mr. Lema, called 911 and described the intruder, including his race, his gender, his clothing, and what he was carrying. The evidence further showed that police apprehended King-Pickett nearby and he matched the exact description given by the victims, and was found in possession of a white bag matching Mr. Lema's description, that contained Mr. Lema's stolen property. This was within minutes of the crime occurring. The State's evidence also showed that Mr. Lema told police in a field show-up that he was 70% sure that King-Pickett was the person who burglarized his house. This evidence, coupled with Mr. Lema's change in story at trial, along with his testimony that he did not wish to testify and was there against his will, gave rise to the reasonable and logical inference that Mr. Lema

intentionally changed his story at trial for some reason. The prosecutor's statement in closing did not tell the jury that Mr. Lema had been tampered with or coached, but only stated it's possible some outside influence caused Mr. Lema to change his story at trial, but we don't know. What we do know is he didn't want to testify. The 911 call was credible, and was contemporaneous to the event as it was happening, when everything was fresh in the witness's mind and memory. RP 116-19. Based on the witness's initial statements in the 911 call and to police, and then his change in testimony at trial, coupled with his desire not to be involved, it was a reasonable inference that something caused Mr. Freeman-Lema to change his story. That is all the prosecutor inferred and that inference was entirely reasonable and appropriate within the context of his closing argument. The prosecutor did not commit misconduct by making this reasonable inference from the evidence.

"In closing argument the prosecuting attorney has wide latitude to argue reasonable inferences from the evidence...." *State v. Thorgerson,* 172 Wn.2d 438, 448, 258 P.3d 43 (2011) (citing *State v. Hoffman,* 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991), and *State v. Fisher,* 165 Wn.2d 727, 747, 202 P.3d 937 (2009)). Furthermore, "[a] prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the

evidence." *State v. Lewis*, 156 Wn.App. 230, 240, 233 P.3d 891 (2010) (citing *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006)). The prosecutor in King-Pickett's trial below made a reasonable and proper inference from the evidence that was presented at trial. Similarly, in *State v. McKenzie,* 157 Wn.2d 44, 134 P.3d 221 (2006), the Supreme Court found no misconduct when the prosecutor made inferences about a defendant's intentions from evidence admitted at trial. There, the evidence produced showed the defendant had not arranged counseling for the victim, he had wanted to pursue mediation, and had considered finding help in Canada. *McKenzie*, 157 Wn.2d at 58. In arguing this evidence, the prosecutor said that it showed the defendant wanted to buy the victim's silence. *Id.* While the Supreme Court found this argument a weak inference from the evidence, it found that even if this was misconduct, it was not so prejudicial as to warrant a new trial, especially when the defendant did not object to the argument. *Id.* at 59.

The prosecutor's arguments at King-Pickett's trial were well within the acceptable parameters of argument about witness credibility, intentions, and inferences from the evidence admitted at trial. "[P]rosecutors have wide latitude to argue reasonable inferences from the facts concerning witness credibility." *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008) (citing *State v. Stenson*, 132 Wn.2d 668, 727, 940

P.2d 1239 (1997)). In fact, prosecutors also may properly argue why a jury should believe one witness over another. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). The prosecutor's arguments at King-Pickett's trial amounted to permissible and appropriate argument on the credibility of a witness, and arguing reasonable inferences from all the evidence presented at trial. The prosecutor did not introduce new evidence as King-Pickett suggests. He clearly told the jury that something might have happened to have changed the witness's testimony and that they didn't know whether that happened or not, but that it didn't matter as the credible evidence from the 911 call and all the other evidence can convince the jury that it was the defendant who committed this crime. This type of argument is wholly proper and appropriate. There was no prosecutorial misconduct.

Further, the cases King-Pickett relies on to support his argument are inapposite. Every case he cites to deals with a prosecutor seeking to admit evidence that had been ruled inadmissible. *See* Br. of Appellant, p. 7-8 (discussing *State v. Smith*, 189 Wn. 422, 65 P.2d 1075 (1937), *State v. Stith,* 71 Wn.App. 14, 856 P.2d 415 (1993), and *State v. Fisher*, 165 Wn.2d 727, 202 P.3d 937 (2009)). The prosecutor below did not seek to introduce any inadmissible evidence at trial as did the prosecutors in *Smith, supra, Stith, supra,* and *Fisher, supra.* When defense's objection

was sustained during the officer's testimony, the prosecutor indicated he had no more questions of the witness and never again attempted to elicit the evidence. RP 227-29. The complained-of conduct is nothing more than a prosecutor arguing a witness's credibility to the jury, something that is clearly permissible. The prosecutor below stated, "There could have been outside influences. There could have been something that happened to Mr. Freeman-Lema that caused him to lessen his identification or change his story somewhat. Either way that 911 tape the day in question right after this happened when it was fresh in their mind, they gave a pretty clear description that matched this person we have in court." RP 320. Two sentences of this closing argument, wherein the prosecutor argued to the jury that there may have been something that happened to make it so the eye-witness changed his testimony from what he told the police the day the incident occurred. The prosecutor did not introduce evidence, or tell the jury that is indeed what happened. In fact, it's clear in the following few sentences that the crux of the prosecutor's argument was that the most credible witness was the one who called 911, and not the one on the witness stand during trial, who had who knows what influencing his testimony today. The prosecutor's entire argument was proper, appropriate, and permissibly discussed reasonable inferences from the evidence and credibility of witnesses. King-Pickett has not shown that the

prosecutor committed any misconduct, let alone misconduct that was so flagrant and ill-intentioned as to deny him a fair trial. This claim should be denied as there was no misconduct.

Even if this Court finds the prosecutor's statements were improper, improper argument does not require reversal unless the error was prejudicial to the defendant. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The court in *Davenport* stated:

> Only those errors [that] may have affected the outcome of the trial are prejudicial. Errors that deny a defendant a fair trial are per se prejudicial. To determine whether the trial was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury. In doing so, the court should consider whether the irregularity could be cured by instructing the jury to disregard the remark. Therefore, in examining the entire record, the question to be resolved is whether there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial.

Davenport, 100 Wn.2d at 762-63.

A defendant's failure to object to potential misconduct at trial waives his challenge to the misconduct unless no curative instruction would have obviated the prejudicial effect on the jury and the misconduct caused prejudice that had a substantial likelihood of affecting the verdict. *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012). The main focus of this Court's analysis on a prosecutorial misconduct claim when the defendant did not object at trial is whether the potential prejudice could

have been cured by an instruction. *Id.* at 762. Even if the prosecutor's statement was improper, it was a very small portion of his argument, not heavily argued, and could have been cured by an instruction from the court.

In considering the context of the entire trial, the prosecutor's entire closing argument, and the evidence in the case, as the legal standard directs, it is clear the brief, fleeting improper discussion does not undermine this Court's confidence in the outcome of the trial. In determining whether misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict, the question is always, "'has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?'" *Emery*, 174 Wn.2d at 762 (quoting *Slattery v. City of Seattle*, 169 Wn. 144, 148, 13 P.2d 464 (1932) (alteration in original)). The prosecutor's remarks were not so flagrant as to have engendered a feeling of prejudice in the minds of the jurors.

Further, in determining whether misconduct prejudiced the defendant, Courts should consider the strength of the evidence against the defendant, along with other trial regularities in determining if the misconduct resulted in prejudice. *Anderson*, 153 Wn.App. at 432, n. 8. The prosecutor's arguments contained no other improper remarks, there

was no instructional error, and the trial as a whole contained no other misconduct or irregularities. The evidence in this case was overwhelming: a 911 call describing a burglary in progress, a physical description of the perpetrator immediately given by the victim (including the person wearing jeans, white shoes, gray hoodie, black male), and a bag he was carrying, full of the victims' items, described for police, then King-Pickett found, a police dog alerting, and King-Pickett matching the physical description of the perpetrator and carrying a bag of the same color and style as that observed by the victims, with the victims' stolen items inside of it, found within a mile of the victims' residence within 15 minutes of the burglary. *See* RP 309-20. The evidence of King-Pickett's guilt is overwhelming. The prosecutor's discussion of potential reasons why Mr. Freeman-Lema would have changed his story from the day of the incident to his testimony at trial did not prejudice King-Pickett nor improperly sway the jury to convict when it would have otherwise acquitted. Any potential misconduct from the prosecutor's argument was not prejudicial and King-Pickett has not shown that it was.

II. Trial Counsel was Not Ineffective for Electing not to Object to the Prosecutor's Arguments

King-Pickett argues his trial attorney was ineffective for failing to object to the prosecutor's argument about the credibility of Mr.

Freeman-Lema. King-Pickett alleges his attorney's failure to object permitted the State to present a scenario involving witness tampering of the main witness to the jury and that this changed the outcome of the trial. As discussed above, the prosecutor's statements during his closing arguments were not improper, and King-Pickett's attorney was not ineffective for failing to object. King-Pickett's claim fails.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that

> the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

Thomas, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); *see also State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011) (stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney's performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kyllo*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the

theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that "but for counsel's deficient performance, the outcome of the proceedings would have been different." *Kyllo*, 166 Wn.2d at 862. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing

court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

Also, in making a determination on whether defense counsel was ineffective, the reviewing court must attempt to eliminate the "distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from the counsel's perspective at the time." *Id.* at 689. The reviewing courts should be highly deferential to trial counsel's decisions. *State v. Michael*, 160 Wn. App. 522, 526, 247 P.3d 842 (2011). A strategic or tactical decision is not a basis for finding error in counsel's performance. *Strickland*, 466 U.S. at 689-91.

"Counsel's decisions regarding whether and when to object fall firmly within the category of strategic or tactical decisions." *Id.* (citing *State v. Madison*, 53 Wn.App. 754, 763, 770 P.2d 662 (1989)). The failure to object only establishes ineffective assistance of counsel in the most egregious of circumstances. *Id.* This Court presumes that the failure to object was the result of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption. *Id.* at 20 (citing *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004)). Additionally, in a claim of ineffective assistance of counsel based on failure to object to prosecutorial misconduct, when the prosecutor's arguments are not

improper, defense counsel is not deficient for failing to object. *See State v. Larios-Lopez,* 156 Wn.App. 257, 262, 233 P.3d 899 (2010) (stating "[b]ecause we have already determined that the prosecutor's arguments were not improper, Larios-Lopez does not show that his counsel's performance was deficient in failing to object to them."). Further, in order to show his attorney was ineffective, King-Pickett must show that his objections to the prosecutor's arguments would have been sustained. *See State v. Johnston*, 143 Wn.App. 1, 19, 177 P.3d 1127 (2007) (citing to *Davis*, 152 Wn.2d at 748).

As argued above, King-Pickett has not shown that the prosecutor's statements constituted misconduct and therefore his attorney could not have been deficient in failing to object to those arguments. King-Pickett's claim of ineffective assistance of counsel should be rejected. The prosecutor's argument was proper. A prosecutor "has wide latitude to argue reasonable inferences from the evidence, including evidence respecting the credibility of witnesses" during closing argument. *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011) (citing *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991) and *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009)). Instead of focusing on snippets of argument taken out of context, this Court looks to the entire argument to determine whether the prosecutor's argument was improper

or vouched for a witness's credibility. *State v. Jackson*, 150 Wn.App. 877, 884, 209 P.3d 553 (2009). In *Jackson*, the prosecutor argued a police officer's "testimony was accurate and true" during his closing argument. *Id.* This Court found the prosecutor did not vouch for the officer's credibility, but rather argued that the "evidence (and reasonable inferences from the evidence) could support the jury's conclusion that the officers were credible...." *Id.* at 884-85. The argument in *Jackson*, which this Court found to be proper, is similar to the prosecutor's statement in the case at bar. In King-Pickett's trial, the prosecutor discussed the evidence presented at trial, discussed why certain witnesses were not credible, and why the evidence presented by the State was persuasive. An objection at trial would not have been sustained, nor would the fact of objecting or an instruction to disregard have changed the outcome of the trial. No attorney can be expected to make frivolous objections and motions.

But even if the prosecutor's reference to potential reasons why Mr. Freeman-Lema changed his story was improper, King-Pickett has failed to show any prejudice, either from the prosecutor's discussion, or from his attorney's failure to object to this argument. As previously discussed, King-Pickett suffered no prejudice from the prosecutor's argument. He also suffered no prejudice from his attorney's decision not to object. A legitimate trial strategy may, at times, be to not object. At the trial below,

the prosecutor's statements on this subject were brief and noncommittal. He then moved on to argument that King-Pickett does not now claim is error. Had his attorney objected, and a discussion occurred, even if the judge had sustained and ordered the jury to disregard, it likely would have called more attention to the prosecutor's statements than the jury had given it in the first place. This would have been the opposite of King-Pickett's goal, and thus a reasonable trial strategy could have been to not object as the statements were not that concerning and the attention that an objection would bring to the statements could have been more damaging. This would have been a prudent move on the defense attorney's part.

King-Pickett's claim of improper argument on the part of the prosecutor is without merit. As an attorney is not required to make frivolous objections or motions, King-Pickett's attorney was not deficient for failing to object to the prosecutor's proper arguments. Furthermore, King-Pickett cannot show that any failure to object prejudiced him by either showing the outcome of the trial would have been different had his attorney objected, or that a reviewing court's analysis would have been different under the lesser burden afforded to preserved claims of prosecutorial misconduct. King-Pickett has not sustained his claim of ineffective assistance of counsel. King-Pickett's claim fails.

III. The Trial Court Properly Instructed the Jury on Reasonable Doubt

King-Pickett argues the trial court erred in giving the standard beyond a reasonable doubt instruction as found in WPIC 4.01 because it shifted the burden of proof and undermined his presumption of innocence. The trial court properly used WPIC 4.01 to instruct the jury, and this instruction did not shift the burden of proof or undermine King-Pickett's presumption of innocence. The trial court should be affirmed.

As an initial matter, not only did King-Pickett not object to the propriety of WPIC 4.01 at trial, but he proposed this instruction, thus requesting the trial court give the instruction. The invited error doctrine prohibits a party from setting up an error at trial and complaining of it later on appeal. *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), *overruled on other grounds by State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995). Specifically in *State v. Studd,* 137 Wn.2d 533, 973 P.2d 1049 (1999) our State Supreme Court stated "a party may not request an instruction and later complain on appeal that the requested instruction was given." (*Studd*, 137 Wn.2d at 546 (quoting *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990) (emphasis omitted) (quoting *State v. Boyer*, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979)). King-Pickett asked the trial court to give WPIC 4.01. CP 55. He cannot now complain the trial court

followed his request and gave this instruction on appeal. For this reason, this Court should deny review of King-Pickett's claimed instructional error.

Further, King-Pickett did not object to the propriety of WPIC 4.01 at trial. RP 320. A defendant generally waives the right to appeal an error unless he or she raised an objection at trial. *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). One exception to this rule is made for manifest errors affecting a constitutional right. RAP 2.5(a)(3); *Kalebaugh*, 183 Wn.2d at 583. An error is manifest if the appellant can show actual prejudice. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). King-Pickett claims an error of constitutional magnitude in assigning error to the trial court's use of a particular instruction for the burden of proof. However, King-Pickett fails to show either error or prejudice in the court's giving of this instruction.

"Jury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt." *State v. Pirtle,* 127 Wn.2d 628, 656, 904 P.2d 245 (1995). "It is reversible error to instruct the jury in a manner that would relieve the State of this burden." *Pirtle,* 127 Wn.2d at 656. This Court reviews a challenged jury instruction de novo. *Id.* The challenged instruction must be evaluated in the context of all the instructions as a

whole. *Id.* "We review a challenged jury instruction de novo, evaluating it in the context of the instructions as a whole." *Pirtle,* 127 Wn.2d at 656.Jury instructions are upheld if they allow the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

King-Pickett challenges WPIC 4.01, an instruction which has never been held to be improper. In fact, the Supreme Court directed trial courts to use this instruction to instruct juries on reasonable doubt. *Bennett*, 161 Wn.2d at 318. The trial court below used WPIC 4.01, and made no amendments, additions or deletions to the standard instruction. CP 69. King-Pickett argues that despite this mandate from the Supreme Court, the instruction informs jurors that they must be able to articulate their doubt, essentially filling in the blank as to why they find a defendant not guilty. Br. Of Appellant, p. 27-28.

Our courts have approved the language of WPIC 4.01 as constitutionally valid for many years. In *State v. Thompson*, 13 Wn.App. 1, 533 P.2d 395 (1975), the Court on appeal considered the phrase "a doubt for which a reason exists" and found this statement does not direct the jury to assign a reason or reasons for their doubts, but simply points out that their doubts must be based on reason, and cannot be something

vague or imaginary. *Thompson*, 13 Wn.App. at 5. In fact, the Court in *Thompson* stated, "[a] phrase in this context has been declared satisfactory in this jurisdiction for over 70 years." *Id.* (citing *State v. Harras*, 25 Wn. 416, 65 P. 774 (1901)). Adding the 41 years that have passed since *Thompson* was issued, our jurisdiction has now approved this language for well over a century.

King-Pickett cites to *Kalebaugh, supra* to support his argument that the instruction given below improperly shifted the burden of proof. In *Kalebaugh* the trial court gave a proper WPIC 4.01 instruction on beyond a reasonable doubt, but in its preliminary comments the court attempted to further explain the instruction by telling the jury that it meant "a doubt for which a reason can be given." *Kalebaugh*, 183 Wn.2d at 585. The Supreme Court did not like the trial court's "offhand explanation," but found the error was harmless as the court went on the properly instruct the jury, using WPIC 4.01, at the end of the case. *Id.* at 586.

King-Pickett also cites to *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012) to support his argument. In *Emery*, the prosecutor argued in closing argument that "in order for you to find the defendant not guilty ... you'd have to say, quote, I doubt the defendant is guilty, and my reason is blank. ... If you think you have a doubt, you must fill in that blank." *Emery*, 174 Wn.2d at 750-51. This statement by the prosecutor did shift

the burden of proof to the defendant to disprove his guilt. However, the Supreme Court found this argument was harmless error as the trial court properly instructed the jury on the reasonable doubt standard, via WPIC 4.01, and the appellant could not show the prosecutor's argument affected the jury's verdict. *Id.* at 762-63. Though *Emery* did not involve an argument about the appropriateness of the language in WPIC 4.01, it shows the Supreme Court's continued approval of WPIC 4.01, even for the language King-Pickett now objects to of "a doubt for which a reason exists...." Our Supreme Court has consistently approved the use of WPIC 4.01 in criminal jury trials, and even directed trial courts to use it. The trial court below properly instructed the jury on the reasonable doubt standard, and our State's jurisprudence shows this instruction is constitutionally firm and appropriate.

Based on our Courts' past approval of WPIC 4.01 for instructing a jury on the reasonable doubt standard, this court should affirm the trial court's giving of this instruction. The principle of *stare decisis* requires that when an issue has been previously decided, it cannot be overturned absent a finding that the prior decision is both incorrect and harmful. *State v. Lucky,* 128 Wn.2d 727, 735, 912 P.2d 483 (1996). This principle "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to

the actual and perceived integrity of the judicial process." *Keene v. Edie*, 131 Wn.2d 822, 831, 935 P.2d 588 (1997) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)). The trial court below followed our Supreme Court's directive in *Bennett, supra*. The court did so at King-Picket's request. The interests of justice require the consistent application of our prior jurisprudence, and here, this compels rejection of King-Pickett's argument.

This Court has recently affirmed use of WPIC 4.01 for use in criminal jury trials. In the unpublished case of *State v. Tolman,* 2016 WL 6995552 (November 29, 2016), this Court affirmed a trial court's use of WPIC 4.01, stating "[j]ury instructions following WPIC 4.01 are constitutional and proper." *Tolman,* slip op. p. 7 (citing *Bennett*, 161 Wn.2d at 318). This Court also addressed King-Pickett's exact argument in *State v. Parnel*, 195 Wn.App. 325, 381 P.3d 128 (2016). There, this Court found it was "bound by the Supreme Court's approval of WPIC 4.01." *Parnel*, 195 Wn.App. at 328. Thus, this Court found the instruction given in *Parnel*'s trial followed WPIC 4.01 and that it was a proper instruction to the jury. *Id.* at 329. The trial court in King-Pickett's case used the same instruction as was used in the *Parnel* case. As this Court has recently decided this issue, it should continue to follow its own precedent

and the Supreme Court's approval and affirm the trial court's use of WPIC 4.01. The trial court should be affirmed.

IV. The State will not Seek Appellate Costs

The State will not seek appellate costs if it substantially prevails in this appeal; therefore King-Pickett's argument on this matter is moot.

CONCLUSION

King-Pickett has not shown prosecutorial misconduct occurred, that his attorney was deficient, or that he was prejudiced in any way. The trial court properly instructed the jury using approved standard instructions that properly conveyed the definition of a reasonable doubt. The trial court should be affirmed in all respects.

DATED this 11th day of January, 2017.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: _____
RACHAEL R. PROBSTFELD, WSBA #37878
Senior Deputy Prosecuting Attorney
OID# 91127

CLARK COUNTY PROSECUTOR

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